



**IN THE EAST AFRICAN COURT OF JUSTICE
AT ARUSHA
FIRST INSTANCE DIVISION**



(Coram: Yohane B. Masara, PJ; Charles O. Nyawello, DPJ; Charles A. Nyachae, Richard Muhumuza & Richard Wabwire Wejuli, JJ)

**APPLICATION NO. 35 OF 2022
(Arising from Reference No. 44 of 2022)**

**PETER ODIWUOR NGOGE T/A
O.P NGOGE AND ASSOCIATES
ADVOCATES.....APPLICANT**

VERSUS

**THE ATTORNEY GENERAL OF THE
THE REPUBLIC OF KENYA RESPONDENT**

20TH NOVEMBER 2023

RULING OF THE COURT

A. INTRODUCTION

1. This is an Application by Peter Odiwour Ngoge (hereinafter “the Applicant”) against the Attorney General of the Republic of Kenya (hereinafter “the Respondent”). The Applicant seeks an interim order to restrain the High Court of Kenya at Milimani, Nairobi, from enforcing the Bill of Costs dated 14th July 2022 arising from the High Court Judgement in **Constitutional Petition No. 111 of 2018** dated 19th May 2022, pending the determination of **Reference No.44 of 2022** before this Court.
2. The Application is premised on Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community (hereinafter “the Treaty”), as well as Articles 16, 17, 18, 19, 20, 21, 22 and 23 of the United Nations Basic Principles on the Role of Lawyers.

B. REPRESENTATION

3. At the hearing the Applicant was self-represented. The Respondent was represented by Mr Oscar Eredi, Chief State Counsel.

C. BACKGROUND

4. Some years back, the client of the Applicant, named Rosemary Akochi Wafula, was injured in a road traffic accident involving a vehicle insured by the United Insurance Co. Ltd. A settlement was reached by which the insurance company agreed to pay a certain sum in settlement. That settlement culminated in “**the consent judgment recorded by the parties’ Advocates in Mombasa CMCC NO. 4813**”

of 2001 and in Mombasa CMCC NO. 4385 of 1998.” Pursuant to that judgment, the United Insurance Co. Ltd issued a cheque in the sum of the value expressed in the consent decree. Eventually, the cheque bounced.

5. That bouncing of the cheque led the Applicant to commence **Constitutional Petition No. 111 of 2018** against the Statutory Manager of United Insurance Co. Ltd and the Insurance Regulatory Authority of Kenya in the High Court of Kenya at Milimani, Nairobi. On 19th May 2022, the High Court entered its judgment in favour of the Defendants. Accordingly, the Applicant was ordered to pay the litigation costs of the Defendants.
6. Dissatisfied with the judgment of the High Court in the Constitutional Petition above, the Applicant filed **Reference No. 44 of 2022** on 9th September 2022. The Reference is now pending before this Court.
7. Subsequently, execution proceedings ensued. On 5th August 2022 the Applicant was served with the Bill of Costs dated 14th July 2022. He then filed this Application.

D. GROUNDS OF THE APPLICATION

8. The grounds of the Application are contained in the Notice of Motion dated 1st November 2022. They are as follows (reproduced verbatim):
 - a. **That the Applicants Reference No. 44 of 2022 is neither frivolous nor a sham but raises serious and weighty Triable issues under Article 6(d) and 7(2) of the East African Treaty**

with overwhelming chances of success against the Respondent herein;

b. That the Applicants Reference No. 44 of 2022 is also of manifest public interest in view of thousands of victims of United Insurance Co. Ltd which was placed on Moratorium before compensating its victims and that therefore the balance of convenience favours the Applicants case in Reference No. 44 of 2022; and

c. That in the premises, unless the prayers being sought herein are allowed, the Applicant who is a practising Barrister and thousands of his Clients stand to suffer irreparably especially if the Taxed Costs is enforced by Committing the Applicant herein to civil jail and/or by subjecting the Applicant herein to Bankruptcy proceedings and/or by Attaching the Applicants Law firm or by attaching the Applicants Clients Accounts in contravention of Articles 16, 17,18, 19, 20, 21, 22 and 23 of the United Nations Basic Principles on the Role of Lawyers and Contrary to Articles 6(d) and 7(2) of the East African Treaty.

9. On that basis the Applicant prays for the orders that (reproduced verbatim):

a. This Application be Certified Extremely Urgent and the same be heard electronically Via Video Conference forthwith in the first Instance and on priority basis to any other matter in the above-captioned Reference; and

b. That pending the hearing and determination of the Applicants Reference No. 44 of 2022 interim Mandatory injunction and Orders be issued forthwith to Restrain the High Court of Kenya at Nairobi in Milimani High Court Constitutional Petition No. 111 of 2018 from Taxing and enforcing the Respondents Bill of Costs dated 14th July 2022 and/or from Taxing and enforcing any Bill of Costs.

10. On his part, the Respondent chose not to submit an affidavit in reply to the Application. On 17th March 2022, however, the learned Counsel for the Respondent raised a preliminary point of law, whose grounds are as follows (reproduced verbatim):

- a. That the sovereign power as vested on the People of Kenya under the Constitution of Kenya is delegated to the three arms of government being the Executive, Parliament and the judiciary and is to be exercised in accordance with the Constitution;**
- b. That the Applicant has failed to exhaust the available remedies under the Kenyan law by invoking the jurisdiction of the Court of Appeal having not been satisfied with the decision of the High Court in Constitutional Petition no. 111 of 2018; and**
- c. That this honourable Court lacks jurisdiction to hear and determine the Applicant's Reference No. 44 of 2022 and Applicant's Application dated 28th October 2022.**

E. ISSUE FOR DETERMINATION

11. From the preceding positions and grounds, two issues arise. They are:

1. **Whether Reference No. 44 of 2022 was filed within the prescribed time to vest this Court with jurisdiction to hear and determine this Application No. 35 of 2022.**
2. **Whether the Application for interim orders has merits.**

F. COURT'S DETERMINATION

ISSUE NO. 1: Whether Reference No. 44 of 2022 was filed within the prescribed time to vest this Court with jurisdiction to hear and determine this Application No. 35 of 2022

12. In his submission on this issue, Mr Eredi for the Respondent asserts that the Court has no jurisdiction to hear and determine **Application No. 35 of 2022** because **Reference No. 44 of 2022** was filed out of the stipulate time frame. Mr Eredi pointed out that the judgment impugned in the Reference was delivered on 19th of May 2022 and **Reference No. 44 of 2022** was filed on 9th September 2022. In that regard, it is his position that the Reference was filed beyond the two months' period provided for under Article 30(2) of the Treaty. On the basis of that computation, he maintains that the Court has no jurisdiction to hear and determine this Application.

13. To support his position, Mr Eredi referred us to the decision in **The Attorney General of the Republic of Uganda & the Attorney**

General of the Republic of Kenya (As Interested Party) vs Omar Awadh and 6 others, EACJ Appeal No. 2 of 2012.

14. Conversely, the Applicant opposed the argument of the Respondent. It is his submission that the Court has jurisdiction to hear and determine this Application because the Reference was filed on time, counting from 5th August 2022, the date that he was notified of the Judgment against him. It is his case that he did not appeal to the Court of Appeal or even to the Supreme Court of Kenya because local judicial remedies were not available to him. It is his further submission that the assertion that this Reference was filed out of time cannot be raised as a preliminary point because that matter requires evidence. Further, it is Mr Ngoge's assertion that his Application was not opposed by the Respondent State.
15. We have carefully considered the arguments on both sides of the dispute. The issue revolves around the time within which a Reference can be filed in the Court. There is no dispute as to the date of both the impugned judgment and the date of the filing of **Reference No. 44 of 2022**. The only difference relates to the moment from which the time begins to run.
16. The time period within which to file a Reference in the Court is governed by Article 30(2) of the Treaty, which provides:

“The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of

the day in which it came to the knowledge of the complainant, as the case may be.”

17. Article 30(2) is illustrated by a long line of precedents of this Court. In paragraph 48 of **The Attorney General of the Republic of Uganda & Anor vs. Omar Awadh and 6 others** (supra) the Appellate Division of this Court stated:

“The Court is still of the same view: that the objective of Article 30(2) is legal certainty. It still notes that the purpose of this amended provision of the Treaty was to secure and uphold the principle of legal certainty; which requires a complainant to lodge a Reference in the East African Court of Justice within the relatively brief time of two months. Nowhere does the Treaty provide for any exception to the two months period ...”

18. Hence, Article 30(2) and the line of illustrating precedents delineate the law governing the time period within which a complainant shall lodge a Reference in the Court.

19. Returning to the submissions of the parties, the Respondent makes the following points:

- a. The impugned judgment was entered on 19th of May 2022;**
- b. Reference No. 44 of 2022 was filed on 9th September, 2022;**
- c. The law requires filing within the period of two month from date of the pertinent enactment, publication, directive, decision or action complained of, or from the day on which**

the cause of action came to the knowledge of the complainant;

d. The Reference was filed more than 60 days from the date of the impugned judgment;

e. The time began to run from the date of the impugned judgment; and

f. The Applicant was aware of the impugned judgment as he was a party to the proceedings.

20. The Respondent did not attach a copy of the impugned judgment, as he did not submit an affidavit in reply to the Application.

21. From the submissions of the Applicant the following points can be deduced:

a. Reference No. 44 of 2022 was filed on 9th September 2022;

b. The Applicant was not aware of the impugned judgment;

c. The impugned Judgment came to his knowledge on 5th August 2022; and

d. The time began to run from 5th August 2022.

22. Similarly, the Applicant did not attach a copy of the impugned Judgment.

23. By comparing the preceding summaries, we find ourselves persuaded by the argument advanced by the Respondent. Our reason is two-fold. First, Counsel for the Respondent stated the law on the point and gave

specific dates from which computation can be made; however, the Applicant failed to specify the nature of the judgment made against him. Whether it was a default judgement or otherwise.

24. Secondly, we take judicial notice of the practice that execution proceedings can only be commenced after the judgment has become final. In his submissions, Mr. Ngoge states that he became aware of the judgment when he was notified with the Bill of Costs in the context of execution proceedings. But execution can commence after the court becomes certain that the parties are aware of the judgment and the losing side has not exercised its right of appeal or has exhausted all appellate stages.
25. On the basis of the preceding, it is our finding that the date of delivery of the impugned judgment was known to the Applicant and he did not exercise his right of appeal.
26. The law requires a complainant to lodge their Reference in Court within a period of two months from the time of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant. In the instant case, the Applicant filed his Reference beyond the two months' period allowed for lodging a Reference in the Court. Therefore, the Applicant has failed to meet the requirement of the law. Accordingly, we answer this issue in the negative – the Court has no jurisdiction to hear and determine the Application.

ISSUE NO. 2: Whether the Application for interim orders has merits

27. Our finding that the Court has no jurisdiction in the preceding paragraph renders unnecessary the discussion of this issue.

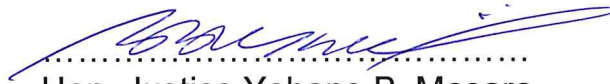
G. CONCLUSION

28. In the result, and for the reasons above, we find that the Respondent has succeeded to prove his preliminary point of law on the preponderance of probabilities.

29. Accordingly, we hereby dismiss the Application with no orders as to costs.

30. It is so ordered.

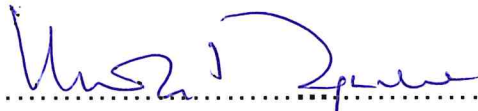
Dated, signed and delivered at Arusha this 20th day of November 2023.



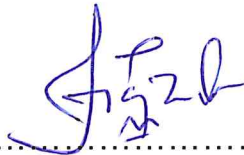
Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE



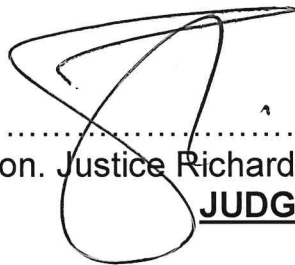
Hon. Justice Dr Charles O. Nyawello
DEPUTY PRINCIPAL JUDGE



Hon. Justice Charles A. Nyachae
JUDGE



Hon. Justice Richard Muhumuza
JUDGE



Hon. Justice Richard Wabwire Wejuli
JUDGE